90-1849

Supreme Court, U.S.
FILED
MAY 31 1991
OFFICE OF THE CLERK

CASE NO

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

NORRIS McMACKIN, WARDEN

Petitioner,

v.

DARRYL L. HART,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a federal circuit court disregard express factual findings arising out of a full state court evidentiary hearing which are fairly supported by the record?

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OPINIONS BELOW

The April 4, 1991, order of the United States Court of Appeals for the Sixth Circuit denying Petitioner's motion to stay the mandate in *Hart v. Marion Correctional Institution,* Case No. 90-3300 is unpublished and unreported. (A-2). The decision of the United States Court of Appeals for the Sixth Circuit is reported as *Hart v. McMackin,* 927 F.2d 256 (6th Cir. 1991), (A-3). The decision of the United States District Court for the Northern District of Ohio, Western Division, is unreported. (A-11). The decision of the Ohio Court of Appeals for the Sixth Judicial District is unreported. (A-19). The Lucas County Common Pleas Court dismissal of Respondent's motion to vacate plea is unreported. (A-33).

JURISDICTION

The opinion of the United States Court of Appeals was entered on March 5, 1991. Jurisdiction is conferred pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The case involves Section 1 of Amendment XIV to the Constitution of the United States:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

and Amendment VI to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy

the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

CASE NO

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

NORRIS McMACKIN,

Petitioner,

v.

DARRYL L. HART,
Respondent.

STATEMENT OF THE CASE

The instant case comes before this Court upon the petition of the State of Ohio to review the decision of the United States Court of Appeals for the Sixth Circuit in *Hart v. Marion Correctional Institution,* 927 F.2d 256 (6th Cir. 1991). Therein the circuit court reversed the judgment of the United States District Court for the Northern District of Ohio and conditionally granted respondent's habeas corpus petition. Specifically the circuit court ordered that the State of Ohio be allowed to bring respondent before a different trial judge for resentencing not to exceed a fifteen (15) year maximum term of incarceration. If sentenced to more than a fifteen (15) year term of incarceration, the circuit court further ordered that respondent must be allowed to withdraw his plea in which case the State of Ohio would have the option of retrying or releasing him.

Respondent's conviction stems from his indictment by the Lucas County Grand Jury on eleven (11) counts of rape, six (6) counts of child endangering, and three (3) counts for corruption of a minor. In summary respondent's nineteen (19) count indictment involved nine different children whose ages ranged from five to thirteen years. Nine of the charges carried a mandatory life sentence. All of the offenses

occurred during a time period that respondent and his wife served as foster parents for the Lucas County Children Services Board for which respondent received sums of money to house, feed, and care for children in the custody of the Children Services Board.

Respondent's criminal activities were first revealed when one of his foster children, twelve (12) year old Angela Glace, told her doctor of respondent's vaginal intercourse with her. The Lucas County Children Services Board soon interviewed respondent's other past and present foster children. As a result of this investigation the authorities learned that respondent had also perpetrated oral sex upon ten (10) year old Carolyn Johnson, anal intercourse, oral sex and physical abuse upon nine (9) year old Brian Koles; anal intercourse, oral sex, and physical abuse with ten (10) year old Jason Brewer; oral rape upon five (5) year old Johnny Johnston and ten (10) year old Brian Huffer; anal intercourse upon ten (10) year old Robert DeSantos, gross sexual imposition against John Boursow; and rape against Mark Ritson.

On January 14, 1986, one week before the scheduled trial, respondent entered into a plea bargain in which he pled no contest to six (6) counts of rape. In return, the prosecution agreed to delete the element of force from the rape counts and to dismiss the remaining thirteen counts. The prosecution also agreed not to bring any further charges against respondent with respect to other sexual assaults on additional foster children. At the plea bargain hearing, the prosecution indicated that its willingness to accept a plea of no contest was solely based on its desire to spare the children from the agony of a trial.

Respondent then tendered his plea during which time the following colloquy took place:

> The Court: Do you understand the penalties that can be imposed in this case?
>
> The Defendant: Yes, sir.

> The Court: Okay. And I'm going to explain them to you for the record just to make sure that you understand what they are.
>
> Those penalties involve sentences on each case of five, six, seven, eight, nine, ten to twenty-five years and a fine in each case of up to ten thousand dollars, do you understand that?
>
> The Defendant: Yes, sir.
>
> The Court: And do you also understand that if I choose to do so I can run — I can impose maximum sentences and run those sentences consecutively, which in essence would give you penalties of 60 to 150 years. However, the Ohio Revised Code §2929.41 says that the maximum sentence that could be served on consecutive multiple sentences is a period of 15 years. You understand that?
>
> The Defendant: Yes, sir.

(A-7; Guilty Plea Tr. 14-15). The trial court thereafter sentenced respondent to three consecutive ten (10) to twenty-five (25) year terms of incarceration to be served concurrently with three consecutive ten (10) to twenty-five (25) year terms of incarceration.

After having served over a year in prison, respondent filed a motion to withdraw his no contest plea in the Lucas County Common Pleas Court. At the hearing which followed both of respondent's defense counsel acknowledged the exceptional strength of the prosecution's case which consisted of the independent testimony of respondent's nine unrelated victims plus corroborating medical evidence. (Evidentiary Tr. 63-64; 119-120). Indeed even respondent was aware of the inevitable result of a contested trial:

> Q. What was your assessment of the likelihood of being acquitted by a jury if you went to trial on those nineteen counts?

A. (Hart) At the beginning I thought I had a chance, but towards the end with all the publicity I felt I didn't have a chance, or too much of a chance being in Toledo.

Q. You felt you didn't have much of a chance of getting an acquittal?

A. (Hart) Not towards the end, no, sir.

Q. And you held that view on January 14, 1987?

A. (Hart) That's right, sir.

(A-28; Evidentiary Tr. 119-120).

Respondent's no contest plea was also motivated by his desire to end the adverse effect that publicity about his crimes was having upon his family. Thus, defense counsel Runner had informed the court during sentencing that:

MR. RUNNER: He accepts it but that is his most difficult responsibility, no concern for himself, but the concern with these charges, the publicity effect on his family, and that is his foremost concern, and I think the Court should realize or hope to realize that this man is deeply committed to his family, and I hope the reports show that. I know that. I know in terms of the plea negotiations that (the publicity) was a major factor, the effect on his family. He never lost sight of that. I know he's troubled over the fact of Linda and Heather.

(Sentencing Tr. 9). Mr. Runner affirmed this assessment at the evidentiary hearing wherein he testified that respondent's desire to avoid adverse publicity for his family was "definitely a factor: and one of two "primary" factors that respondent considered. (Evidentiary Tr. 142, 153). In fact, even respondent agreed that he wanted to avoid the publicity of a trial and that this concern played a major role in his decision to enter the pleas of no contest. (Evidentiary Tr. 124, 125). Finally,

respondent conceded that he was also motivated by the prosecutor's promise not to bring additional similar charges with respect to other sexual perversities that he perpetrated. (Evidentiary Tr. 117, 135).

Subsequent to the evidentiary hearing the trial court filed a judgment entry denying respondent's motion. In so ruling the trial court rendered a binding factual finding that "Even if he was not aware of the sentencing possibilities, the defendant testified to other reasons for entering the pleas which indicated that the defendant would have entered the pleas anyway." (A-33).

Respondent thereafter perfected a timely appeal of said judgment to the Ohio Court of Appeals for the Sixth Judicial District. The appellate court issued a unanimous opinion affirming the trial court's decision. (A-19). In so ruling the appellate court accepted the trial court's factual findings and further noted that respondent "would have entered into the plea bargain agreement even if he possessed completely accurate information." (A-29).

Respondent then sought review before the Supreme Court of Ohio. The court, however, declined to exercise its discretionary review authority.

Respondent next filed a petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2254 in the United States District Court for the Northern District of Ohio, Western Division. On March 9, 1990, the district court issued an opinion dismissing respondent's habeas corpus petition. The district court reasoned as follows:

> [B]oth the trial court and the court of appeals found that petitioner was aware of his actual sentencing possibilities. In the alternative, both courts determined that, based on all the evidence, petitioner would have accepted the plea with full knowledge of the accurate sentence possibilities. The Ohio Court of Appeals pointed out that Hart faced a nineteen count indictment, with multiple

> life sentence offenses. In addition, petitioner himself acknowledged the strength of the state's case against him and his strong reservations about going to trial. Specifically, petitioner stated that he would like to avoid the publicity that a full blown trial would bring, for his family's sake. In conclusion, the state courts determined that Hart's due process rights were not violated due to a possible misunderstanding concerning his sentence. Since petitioner has failed to prove by convincing evidence, that the factual determination of the state court was erroneous, this Court must deny his habeas corpus petition based upon a denial of due process.

(A-16).

An appeal was thereafter perfected to the United States Court of Appeals for the Sixth Circuit. Subsequent to briefing and argument the circuit court conditionally granted the writ giving the State of Ohio ninety days in which to bring respondent before a different trial judge for resentencing. *Hart v. Marion Correctional Institution,* 927 F.2d 256 (6th Cir. 1991). In so ruling the circuit court rationalized its refusal to abide by its statutory duty to defer to the express factual findings of the Ohio judiciary by concluding that the state court evidentiary hearing factual determinations to which it did not agree were not fairly supported by the record within the meaning of 28 U.S.C. Section 2254(d)(8).

Petitioner's motion to stay the mandate pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure has been denied without explanation, by the circuit court. The State of Ohio now petitions this court to review the judgment of the court below.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

A FEDERAL CIRCUIT COURT IS NOT ENTITLED TO DISREGARD EXPRESS FACTUAL FINDINGS ARISING OUT OF A FULL STATE COURT EVIDENTIARY HEARING WHICH ARE FAIRLY SUPPORTED BY THE RECORD.

The instant case concerns the important issue of the presumption of correctness which a federal habeas corpus proceeding must accord to the factual findings arising out of a full state court evidentiary hearing in light of the Congressional mandate of 28 U.S.C. Section 2254(d) as interpreted by this Court in *Sumner v. Mata,* 449 U.S. 539 (1981); *opinion after remand,* 455 U.S. 591 (1982); *Marshall v. Lonberger,* 459 U.S. 422 (1983); and their progeny. An analogous application of this presumption of correctness occurred in *Rushen v. Spain,* 464 U.S. 114 (1983) where a state court conducted a post-conviction hearing after which it concluded that an ex-parte communication between the trial judge and a juror had been harmless error. Thereafter, however, the district court issued a writ of habeas corpus on the grounds that the defendant had been denied the right to be present at a critical state of the proceedings. In its reversal of the district court's decision, this Court declared:

> The factual findings arising out of the state courts' post-trial hearings are entitled to a presumption of correctness. See 28 U.S.C. §2254(d) [28 U.S.C. 2254(d)]; *Sumner v. Mata,* 449 U.S. 539, 66 L.Ed 2d 722, 101 S.Ct. 764 (1981). The substance of the ex parte communications and their effect on juror impartiality are questions of historical fact entitled to this presumption. Thus, they must be determined in the first instance by the state courts and deferred to, in the absence of 'convincing evidence' to the contrary by the federal courts. *See Marshall v. Lonberger,* 459 U.S. 422, 431-432, 74 L. Ed 2d 646, 103 S.Ct. 843 (1983). Here, both the state's trial and appellate courts concluded that the jury's

> deliberations, as a whole, were not biased. This finding of 'fact' - on a question the state courts were in a far better position than the federal courts to answer-deserved a 'high measure of deference,' *Sumner v. Mata,* 455 U.S. 591, 498, 71 L.Ed 2d 480, 102 S.Ct. 1303 (1982), and may be set aside only if it "lack[s] even 'fair support in the record.' *Marshall v. Lonberger,* 459 U.S. at 432, 74 L.Ed 2d 646, 103 S.Ct. 843.

Spain 464 U.S. at 120. Thus it is clear that even the state court's evaluation of the effect that ex-parte communications have on jury impartiality constitutes a binding state court factual finding to which the federal courts must defer.

Ironically even the Sixth Circuit has previously recognized the duty of the federal courts to defer to a state court factual finding that a criminal defendant was aware of the potential maximum sentence he faced by pleading guilty. Specifically in *Nichols v. Perini,* 818 F.2d 554 (6th Cir. 1987), the petitioner raised the issue of the potential maximum sentence that he faced. In rejecting the district court's granting of Nichols' petition, the circuit court explicitly deferred to the Ohio Court of Appeals factual finding that Nichols was aware of his maximum exposure. *Nichols,* 818 F 2d. at 557.

In the case at bar, as in *Rushen* and *Nichols,* the state court conducted a post-conviction hearing. After said hearing the court rendered a binding factual finding based upon its assessment of the testimony and credibility of respondent and his trial counsel that other reasons existed to indicate that respondent would have entered his pleas irregardless of the question of whether respondent was made aware of his actual sentencing possibilities. Thereafter, in its rejection of respondent's appeal, the Ohio Court of Appeals recognized and deferred to the trial court's factual findings as it held: "In reviewing appellant's testimony at the time of the plea hearing and during the hearing on the motion, we find the record replete with conflicting, contradictory statements and reasons for entering the plea agreement." (A-29).

As thus demonstrated the Ohio courts have unanimously agreed that respondent would have tendered his plea irrespective of the sentencing information which he received from the trial court. In rendering this finding it is undeniable that the state courts explicitly relied on testimony emanating from the evidentiary hearing on respondent's motion to vacate. By claiming that the state court factual determinations were not fairly supported by the record the circuit court has utterly failed to accord the deference mandated by 28 U.S.C. Section 2254 to the express factual findings of the Ohio judiciary. Review is therefore warranted so as to evaluate the extent to which compliance with this Court's decision in *Sumner v. Mata*, 449 U.S. 539 (1981), *opinion after remand*, 455 U.S. 591 (1982), and *Marshall v. Lonberger*, 459 U.S. 422 (1983) is mandated.

CONCLUSION

Respondent submits that a writ of certiorari should therefore be issued to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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No. 90-3300

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

O R D E R

DARYL LEE HART

Filed
April 4, 1991

Petitioner-Appellant

v.

MARION CORRECTIONAL INSTITUTION: ATTORNEY GENERAL, State of Ohio

Respondents-Appellees

BEFORE: MARTIN and BOGGS, Circuit Judges; and BELL, District Judge.*

Upon consideration of appellee's motion to stay the mandate, It is ORDERED that the motion be, and it hereby is, DENIED

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

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* The Honorable Robert Holmes Bell, United States District Judge for the Western District of Michigan, sitting by designation.

Recommended FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 90-3300

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DARYL LEE HART,	:	
Petitioner-Appellant,	:	ON APPEAL from the United States District Court
v.	:	for the Northern District of Ohio
MARION CORRECTIONAL INSTITUTION; ATTORNEY GENERAL, State of Ohio,	:	
Respondents-Appellees.	:	

Decided and Filed March 5, 1991

Before: MARTIN and BOGGS, Circuit Judges; and BELL, District Judge.*

BOYCE F. MARTIN, JR., Circuit Judge. Daryl Lee Hart pled guilty to six counts of rape on January 14, 1986. He filed a petition for writ of habeas corpus on April 28, 1989, asserting that his guilty plea was not knowingly, intelligently and voluntarily entered and that he received ineffective assistance of counsel. The trial judge and Hart's attorneys incorrectly informed him that his maximum period of incarceration would only be 15 years.

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* The Honorable Robert Holmes Bell, United States District Judge for the Western District of Michigan, sitting by designation.

The actual period is 75 years, which Hart learned only after he entered his plea. Because of this, we find that Hart did not intelligently enter his plea; thus, we grant the writ of habeas corpus.

Hart was indicted by a grand jury on eleven counts of rape, five counts of child endangering, and three counts of corruption of minors. All of the alleged offenses occurred while Hart and his wife served as foster parents for the Lucas County Children Services Board. The nineteen count indictment involved nine different children whose ages ranged from five to thirteen years, and nine of the charges carried mandatory life sentences.

On January 14, 1986, Hart entered into a plea agreement, pleading no contest to six counts of rape in return for a deletion of the element of force from those rape counts, a dismissal of the other thirteen counts, and a promise not to bring any further charges relating to sexual assaults of any foster children against Hart. Hart was sentenced to a term of thirty to seventy-five years of incarceration.

After serving over a year in prison, Hart filed in the Court of Common Pleas of Lucas County a motion to withdraw his plea. The crux of his assertion was, as it is here, that he did not know the true sentencing possibilities, and if he had, he would not have accepted the plea. The court laconically rejected Hart's motion, ruling:

> The court finds that the defendant was made aware of the actual sentencing possibilities.
>
> Even if he was not aware of the actual sentencing possibilities, the defendant testified to other reasons for entering the pleas which indicated that the defendant would have entered the pleas anyway.

The state appellate court affirmed this judgment and the

Supreme Court of Ohio overruled a motion for leave to appeal.

Hart then filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Ohio. The district court dismissed Hart's petition and this timely appeal followed.

Hart first argues that his plea was not knowingly, intelligently, and voluntarily entered into and, thus, his right to due process was denied. He bases this argument upon his assertion that he did not know the true sentencing possibilities at the time he entered his plea.

The United States Supreme Court has often reiterated that in order to satisfy the dictates of due process a plea of guilty must be a voluntary, knowing, intelligent act. *See, e.g., Brady v. United States,* 397 U.S. 742, 748 (1970). The determination of whether this plea was intelligently made depends upon the particular facts and circumstances of each case. *See Johnson v. Zerbst,* 304 U.S. 458, 463 (1930). The defendant must at least have a "sufficient awareness of the relevant circumstances and likely consequences." *Brady,* 397 U.S. at 748; *Kercheval v. United States,* 274 U.S. 220, 223 (1927).

Hart filed his petition for writ of habeas corpus under 28 U.S.C. §2254. 28 U.S.C. §2254(d) states, in relevant part:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless

> the applicant shall establish or it shall otherwise appear,
>
> . . .
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determinations is not fairly supported by the record. . .

"[T]he interest in federalism recognized by Congress in enacting §2254(d) requires deference by federal courts to factual determinations of all state courts." *Sumner v. Mata,* 449 U.S. 539, 547 (1980). These factual determinations of either trial or appellate courts are not to be overturned, *Id.; see Wainwright v. Goode,* 464 U.S. 78, 85 (1983) (state appellate court resolution of ambiguity in trial court statement entitled to deference), unless they are not "fairly supported by the record." 20 U.S.C. §2254(d)(8). In this case our review involves an identical record to that considered by the state courts, a factor the Supreme Court has considered important in measuring the deference we must give to those courts. *See Sumner,* 449 U.S. at 547. Because the state courts have already determined that Hart did know the actual sentencing possibilities at the time of his plea, we must give deference to those factual determinations and look to the "record as a whole" to judge Hart's claim. 20 U.S.C. §2254(d)(8).

Central to Hart's claim is the following exchange between the court and Hart:

> THE COURT: Do you understand the penalties that can be imposed in this case?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Okay. And I'm going to explain them to you for the record just to make sure that you understand what they are.
>
> Those penalties involve sentences on each case of five, six, seven, eight, nine, ten to twenty-five years and a fine in each case of up to ten thousand dollars, do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And do you also understand that if I choose to do so I can run — I can impose maximum sentences and run those sentences consecutively, which in essence would give you penalties of 60 to 150 years. **However, the Ohio Revised Code Section 2929.41 says that the maximum sentence that could be served on consecutive multiple sentences is a period of 15 years. You understand that?**
>
> THE DEFENDANT: Yes, sir.
>
> . . . .
>
> THE COURT: All right. Do you understand everything that I have said to you here this afternoon?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Do you understand everything that your attorneys and the prosecutor have said

here this afternoon?

THE DEFENDANT: Yes, sir.

THE COURT: And is it still your desire then to enter pleas of no contest to six counts of rape, each being an aggravated felony of the first degree?

THE DEFENDANT: Yes, sir.

(emphasis added). This record shows that the court informed Hart he could be sentenced from 60 to 150 years. The court immediately qualified that information by adding that the maximum period he could *serve* for the sentence would be 15 years. Nowhere does the record show that Hart was informed before entering his plea of the true sentence, a minimum of 30 years and a maximum of 75. He was informed by the court of this range at his sentencing hearing, but again at the hearing, the court stated that under Ohio law he would only serve 15 years of the sentence:

> I would state additionally and parenthetically, that if the Court by law was capable of sentencing you to more time, to have you separated from the society for a longer period of time, I would. However, Revised Code Section 2929.41 requires that even though I have just sentenced you to a sentence of not less than 30 nor more than 75 years, that **the period of incarceration that can be served in this type of case is a maximum period of 15 years, and for that reason I care not to indulge in the folly of sentencing you to any greater sentence.**

(emphasis added). Although this statement occurred after Hart entered his plea, it is evidence that the trial judge himself did not understand the consequences of the plea agreement and, accordingly, did not give Hart correct information on the consequences of his plea.

The examinations of Hart's attorneys set out in the record shows Hart also received the same incorrect information from them with relation to the consequences of his plea:

> QUESTION: Now, Mr. Runner, did you tell Daryl Hart on January 14, 1986 that he would serve a maximum sentence of 15 years?
>
> MR. RUNNER: Yes.
>
> . . . .
>
> QUESTION: And the point Daryl agreed to enter a plea of no contest to six counts of rape contained in two indictments, was this subsequent to your advising Daryl that he would receive a maximum sentence of 15 years?
>
> MR. RUNNER: Yes. . . .
>
> . . . .
>
> QUESTION: Mr. Overley, on January 14, 1986, did you inform or did Mr. Runner in your presence inform Mr. Hart that he would receive the maximum sentence of 15 years regardless of whether the sentences were concurrent or consecutive?
>
> MR. OVERLEY: Yes.

The state appellate court found that Hart did receive "conflicting, arguably erroneous information regarding the maximum sentence involved," but it agreed with the trial court in determining that Hart was aware of the actual sentencing possibilities. We must give deference to this determination only if it is "fairly supported by the record." 28 U.S.C. §2254(d)(8). The record does not contain such support. The record shows Hart was incorrectly informed by his attorneys and the trial judge that his maximum

period of incarceration would be 15 years. Only after Hart entered his plea was he made aware of the 30 to 75 year sentence and, even then, the judge added that a maximum period of 15 years could be served for the longer sentence. The record does not fairly support the factual findings of the state courts relating to Hart's knowledge of the consequences of his plea. To the contrary, the record shows he consistently received incorrect information: the trial judge told Hart the maximum sentence he could serve would be fifteen years and both of his attorneys told him the same.

We find that, because the trial judge and Hart's attorneys incorrectly informed Hart that his maximum period of incarceration would be 15 years and because he was incorrectly informed of the possible term of incarceration before the plea was entered, his plea was not entered with a "sufficient awareness of the relevant circumstances and likely consequences." Therefore, we hold that his plea to the charge as it resulted in the sentence he received was not intelligently entered. Because of this holding we do not need to address Hart's claim of ineffective assistance of counsel. We grant a conditional writ of habeas corpus, giving the State of Ohio ninety days in which the State must bring him before a different trial judge. If Hart is then given any sentence beyond that which Hart believed to be the maximum when he pled guilty, he must be allowed to withdraw his plea. *Cf. Santobello v. New York,* 92 S. Ct. 495, 499 (1971), *Mabry v. Johnson,* 104 S. Ct. 2543, 2548 n.11 (1984). The State may then try him under the original indictment or release him.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

DARYL LEE HART,	:	
Plaintiff(s),	:	CASE NO. 89CV7270
v.	:	OPINION AND ORDER
MARION CORRECTIONAL INSTITUTION, et al.,	:	
Defendant(s).	:	

WALINSKI, J.

This cause is before the Court on petitioner's request for habeas corpus, respondent's return of writ, and petitioner's response thereto. Jurisdiction is based upon 28 U.S.C. §2254. For the foregoing reasons petitioner's request is not well taken and the same is denied.

FACTS

Petitioner, Daryl Lee Hart ("Hart"), was indicted on eleven counts of rape, six counts of child endangering, and three counts for corruption of a minor. Petitioner's nineteen count indictment involved nine different children, ranging in age from five to thirteen years. In addition, all of the offenses took place while Hart and his wife served as foster parents for the Lucas County Children Services Board.

Pursuant to a plea agreement, petitioner pled no contest to six counts of rape. In return, the prosecution agreed to delete the element of force from the rape counts, to dismiss the remaining thirteen counts, and refrain from bringing further charges with respect to other sexual assaults on additional foster children. During the

sentencing the following colloquy took place:

> The Court: Do you understand the penalties that can be imposed in this case?
>
> The Defendant: Yes, sir.
>
> The Court: Okay. And I'm going to explain them to you for the record just to make sure that you understand what they are.
>
> Those penalties involve sentences on each case of five, six, seven, eight, nine, ten to twenty-five years and a fine in each case of up to $100,000, do you understand that?
>
> The Defendant: Yes, sir.
>
> The Court: And do you also understand that if I choose to do so I can run — I can impose maximum sentences and run those sentences consecutively, which in essence would give you penalties of 60 to 150 years. **However, the Ohio Revised Code 2929.41 says that the maximum sentence that could be served on consecutive multiple sentences is a period of 15 years. You understand that?**
>
> The Defendant: Yes, sir.

On February 21, 1986, petitioner was sentenced to six terms of ten to twenty-five years of incarceration, three of which to run concurrent with one another and three to run consecutive.

Subsequently, petitioner filed a motion to withdraw his no contest pleas in the Lucas County Common Pleas Court alleging that his plea was involuntary and that he suffered from ineffective assistance of counsel. Following an evidentiary hearing, in which both sides offered testimony, the court denied petitioner's motion to withdraw.

Thereafter, Hart perfected an appeal to the Court of Appeals for the Sixth Judicial District claiming:

> 1. The trial court erred in overruling the defendant's motion to withdraw his pleas of no contest as the defendant did not knowingly, intelligently and voluntarily enter pleas of no contest as is prescribed in Rule 11(C)(2)(a), Ohio Rules of Criminal Procedure.
>
> 2. The trial court erred in denying Defendant-Appellant's motion to withdraw his pleas of no contest as the Defendant-Appellant could not voluntarily enter pleas of no contest which were based upon misinformation as to the impact of maximum and minimum sentences which would dictate the length of incarceration.
>
> 3. The Defendant's pleas of no contest were not voluntarily entered, pursuant to rule 11(C), as the defendant's Sixth and Fourteenth Amendment rights under the United States Constitution, were violated as a result of ineffective assistance of counsel.

Following the appellate court's decision affirming the court of common pleas, petitioner filed a memorandum in support of jurisdiction in the Ohio Supreme Court contending essentially the same propositions of law. On January 18, 1989, the Supreme Court of Ohio overruled Hart's motion for leave to appeal.

Essentially, Hart believes that his constitutional rights were violated as a result of his alleged misunderstanding regarding the maximum sentence he could receive under Ohio law. Specifically, he claims that his attorneys advised him that the maximum sentence he could receive, if he plead no contest, was fifteen years. He additionally asserts that the trial judge also incorrectly advised him as to the maximum time he could be sentenced to incarceration pursuant to O.R.C. §2907.02. As a result, petitioner claims

that he would not have accepted the plea bargain had he known the accurate sentence possibilities, that he instead would have plead not guilty and therefore encountered a subsequent trial.

Respondent, on the other hand, contends that this Court should defer to the state courts decisions. Moreover, respondent claims that petitioner accepted the plea agreement for numerous reasons, thus, any misunderstanding with regard to sentencing is not dispositive concerning the issue of voluntariness.

DISCUSSION

28 U.S.C. §2254(d) reads in part:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> * * *
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;

Pursuant to the Supreme Court's interpretation of §2254(d) this Court has a duty to affirm the findings of the state court absent a showing of a constitutional violation by clear and convincing evidence. *See Sumner v. Mata*, 449 U.S. 539 (1980).

> [The] interest in federalism recognized by Congress in enacting §2254(d) requires deference by federal courts to factual determinations of all state courts. This is true particularly in a case such as this where a federal court makes its determination based on the identical record that was considered by the state appellate court. . .

Id. at 547. Therefore, petitioner's contention that respondent must bear the burden as to voluntariness is misplaced.

There are two elements subject to analysis in determining whether a given guilty plea was in fact valid. The first is whether the act was voluntary, the second is whether the act was intelligent. *See Brady v. United States,* 397 U.S. 742 (1970); *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973).

Petitioner cites *Bailey v. MacDougall,* 392 F.2d 155 (4th Cir. 1968), to support his contention that he was severely prejudiced by statements of counsel and the presiding judge as to the possible years he could be sentenced. In *Bailey,* the sentencing judge promised the defendant that, in return for a guilty plea, he would sentence to only a fifteen year maximum. However, the judge did not follow through with the promise and after accepting the defendant's guilty plea sentenced him in excess of fifteen years. That is simply not the case here. In the case *sub judice,* the judge made no promises to Hart. The plea agreement did not mention sentencing. Instead, petitioner was the victim of a misunderstanding at best. As such, the reasoning of the *Bailey* court does not apply here.

Moreover, in the case of *White v. Gaffney,* 435 F.2d 1241 (10th Cir. 1971), the prosecuting attorney agreed to recommend to the court that defendant serve a term of years, and not life imprisonment. Nonetheless, at the time of sentencing, the prosecution failed to fulfill the agreement and remained silent as to a recommended

sentence. Furthermore, the record, in White, indicated that defendant clearly would not have agreed to plead had the trial court refused to commit to a lower than maximum sentence. Once again, that is not what took place here. First, in the case at bar, petitioner's counsel incorrectly informed him that if he agreed to the proposed plea, Ohio Revised Code §2929.41(E) limited him to a fifteen year maximum period of incarceration. In actuality Ohio Revised Code limited Hart to a maximum fifteen year period of incarceration before being entitled to parole consideration.[1] That misunderstanding was additionally advanced when the trial court was less than absolutely clear as to the possible sentence pursuant to §2929.41(E). In short, no one, in the present case, made any promises to petitioner. This is not a situation where defendant was unfairly induced to plead guilty in return for a reduced sentence. Therefore, both *Bailey* and *White* are clearly distinguishable.

In addition, both the trial court and the court of appeals found that petitioner was aware of his actual sentencing possibilities. In the alternative, both courts determined that, based on all the evidence, petitioner would have accepted the plea with full knowledge of the accurate sentence possibilities. The Ohio Court of Appeals pointed out that Hart faced a nineteen count indictment, with multiple life sentence offenses. In addition, petitioner himself acknowledged the strength of the state's case against him and his strong reservations about going to trial. Specifically, petitioner stated that he would like to avoid the publicity that a full blown trial would bring, for his family's sake. In conclusion, the state courts determined that Hart's due process rights were not violated due to a possible misunderstanding concerning his sentence. Since petitioner has failed to prove by convincing evidence, that the factual determination of the

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[1] Hart is currently scheduled to appear before the Ohio Parole Board in August 1996, a period of ten and one-half years from the date of his plea.

state court was erroneous, this Court must deny his habeas corpus petition based upon a denial of due process.

Next, the Court will address petitioner's contention that he was the victim of ineffective assistance of counsel in violation of the Sixth Amendment. The case of *Strickland v. Washington,* 466 U.S. 668 (1984), forwarded the test for evaluating claims of ineffective assistance of counsel. The Supreme Court stated:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that deficient performance prejudiced counsel's errors were so serious as to deprive the defendant of a fair trial.

In *Hill v. Lockhart,* 474 U.S. 52 (1985), the court further stated, "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial".

As we mentioned earlier, the state court found that irrespective of petitioner's confusion concerning sentencing, he still would have accepted the plea agreement. The court based its determination upon numerous factors such as petitioner's desire to avoid publicity, petitioner's awareness of the state's strong case,[2] and the severity of the crimes for which petitioner had been indicted. Also, petitioner himself acknowledged that he believed he would not be victorious if the case went to trial.

---

[2] The state's case included testimony from the victims as well as corroborating medical evidence.

We agree with the state court. Petitioner has failed to demonstrate, by convincing evidence, that, but for counsel's errors, he would not have plead no contest. Therefore, petitioner's Sixth Amendment claim must also fail.

It is therefore,

ORDERED that petitioner's habeas corpus petition is hereby denied. Cause dismissed.

NICHOLAS J. WALINSKI
SENIOR U.S. DISTRICT JUDGE

TOLEDO, OHIO
March 8, 1990

COURT OF APPEALS OF OHIO, SIXTH DISTRICT
COUNTY OF LUCAS

C.A. NO. L-87-371

State of Ohio,	:	APPEAL FROM LUCAS COUNTY COMMON PLEAS
Appellee,	:	COURT
V.	:	NO. CR-85-6605 & CR-85-6916
Daryl Lee Hart,	:	
Appellant.	:	DECISION AND JOURNAL ENTRY

DATE September 16, 1988

This cause is before this Court on appeal from a decision of the Lucas County Court of Common Pleas, wherein said court denied appellant's motion to withdraw his pleas of no contest in case Nos. CR 85-6605 and CR 85-6916.

On October 15, 1985, defendant-appellant, Daryl Lee Hart, was indicted by the Lucas County Grand Jury on four counts of rape, in violation of R.C. 2907.02; and two counts of child endangering with physical harm specifications, in violation of R.C. 2919.22. Thereafter, on or about November 20, 1985, Hart was further indicted on seven additional counts of rape, three counts of corruption of a minor and three counts of child endangering. All of the victims were under the age of thirteen.

In summary, the nineteen count indictment, as set forth above, involved nine different children whose ages ranged from five to thirteen years. Nine of the charges carried a mandatory life sentence. All of the offenses occurred over a time period during which Hart and his wife served as foster parents for the Lucas County Children Services Board. Apparently, Hart received sums of money to house,

feed, and care for children in the custody of the Children Services Board.

On January 14, 1986, one week before the scheduled trial, appellant and the state of Ohio entered into a plea bargain arrangement. Pursuant to the agreement, Hart pled no contest to three counts of rape in case No. CR 85-6605, and also entered pleas of no contest to three counts of rape in case No. CR 85-6916. Conversely, the state agreed to delete the element of force from said counts of rape and to dismiss the remaining thirteen counts. The state also agreed not to bring any further charges against Hart in respect to other sexual assaults on additional foster children. This court notes that the state indicated, at the plea bargain hearing, the sole reason the state was willing to accept a plea of no contest was to spare the children from the agony of a trial.

Hart was sentenced on February 21, 1986, to consecutive terms of ten to twenty-five years actual incarceration on each of the three counts in case No. CR 85-6605. As to the three counts in case No. CR 85-6916, Hart was sentenced to ten to twenty-five years actual incarceration, to be served consecutively with each other but concurrent to case No. CR 85-6605. As a result, Hart was sentenced to a term of incarceration of thirty to seventy-five years.

After having served over a year in prison, Hart filed a motion to withdraw his no contest pleas in both cases on May 12 and 14, 1987. A hearing was conducted in which both sides offered evidence. The trial court filed a judgment entry on October 7, 1987, denying appellant's motion to withdraw his pleas of no contest. It is from this decision that appellant has filed a timely notice of appeal, asserting the following assignments of error:

" I. THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION TO WITHDRAW HIS PLEAS OF NO CONTEST AS THE DEFENDANT DID

NOT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY ENTER PLEAS OF NO CONTEST AS IS PRESCRIBED IN RULE 11(C)(2)(a), OHIO RULES OF CRIMINAL PROCEDURE.

"II. THE TRIAL COURT ERRED IN DENYING DEFENDANT-APPELLANT'S MOTION TO WITHDRAW HIS PLEAS OF NO CONTEST AS THE DEFENDANT-APPELLANT COULD NOT VOLUNTARILY ENTER PLEAS OF NO CONTEST WHICH WERE BASED UPON MISINFORMATION AS TO THE IMPACT OF MAXIMUM AND MINIMUM SENTENCES WHICH WOULD DICTATE THE LENGTH OF INCARCERATION.

"III. THE DEFENDANT'S PLEAS OF NO CONTEST WERE NOT VOLUNTARILY ENTERED, PURSUANT TO RULE 11(C), AS THE DEFENDANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND ARTICLE I, §10 and §16, OF THE OHIO CONSTITUTION, WERE VIOLATED AS A RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL."

Before addressing appellant's assignments of error, this court notes that appellant's motion was made pursuant to Crim. R. 32.1, which states:

> "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed or imposition of sentence is suspended; *but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.*" (Emphasis added.)

Any examination of Crim. R. 32.1 must begin by

reviewing the rules as set forth in *State v. Smith* (1977), 49 Ohio St. 2d 261, a leading case in this area of Ohio law. Therein, the Ohio Supreme Court stated, in its syllabus:

> "1. A defendant who seeks to withdraw a plea of guilty after the imposition of sentence has the burden of establishing the existence of manifest injustice. (Crim. R. 32.1.)
>
> "2. A motion made pursuant to Crim. R. 32.1 is addressed to the sound discretion of the trial court, and the good faith, credibility and weight of the movant's assertions in support of the motion are matters to be resolved by that court.
>
> "3. An undue delay between the occurrence of the alleged cause for withdrawal of a guilty plea and the filing of a motion under Crim. R. 32.1 is a factor adversely affecting the credibility of the movant and militating against the granting of the motion."

Subsequent case law interpreting these rules is unequivocally clear. A defendant seeking to withdraw a plea of guilty or no contest after sentencing must satisfy two requirements.[1] First, the defendant has the burden of demonstrating that such withdrawal of his plea is necessary to correct manifest injustice. *Smith, supra,* at 264; *State v. Caraballo* (1985), 17 Ohio St. 3d 66, 67; *State v. Stumpf* (1987), 32 Ohio St. 3d 95, 104; *State v. Longo* (1982), 4 Ohio App. 3d 136, 140. Second, the defendant must show that the trial court abused its discretion. *Smith, supra,* at 264. See, also *State v. Casale* (1986), 34 Ohio

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[1] As can be seen from the face of the rule, no distinction is made between a plea of guilty and a plea of no contest. Consequently, for the purposes of Crim. R. 32.1, the standard of review is the same for both types of plea.

App. 3d 339, 340. This court ruled in *State v. Blatnik* (1984), 17 Ohio App. 3d 201, 202, that"*** an appellate court's review of a trial court's denial of a post-sentence motion to withdraw a guilty plea is limited to a determination of whether the trial court abused its discretion." (Footnote omitted.) See, also, *State v. Peterseim* (1980), 68 Ohio App. 2d 211, at paragraph two of the syllabus.

In *State v. Carter* (Mar. 25, 1988), Lucas App. No. L-87-111, unreported, this court adopted the test for abuse of discretion as set forth in *Peterseim, supra,* which states:

> "A trial court does not abuse its discretion in overruling a motion to withdraw: (1) where the accused is represented by highly competent counsel, (2) where the accused was afforded a full hearing, pursuant to Crim. R 11, before he entered the plea, (3) when, after the motion to withdraw is filed, the accused is given a complete and impartial hearing on the motion, and (4) where the record reveals that the court gave full and fair consideration to the plea withdrawal request." *Id.* at paragraph three of the syllabus.

Turning to the case *sub judice,* appellant does not argue that he established the existence of manifest injustice in the trial court proceedings (*Smith, supra*). Nor does he argue that the trial court abused its discretion in denying the motion to withdraw his pleas of no contest. Rather, appellant asserts that the trial court did not comply with Crim. R. 11(C)(2)(a). Furthermore, appellant contends that since this rule has not been complied with, his pleas of no contest were not made knowingly and voluntarily. Therefore, this court will construe appellant's first two assignments of error to be that noncompliance with Crim. R. 11 constitutes manifest injustice, and that the trial court abused its discretion in denying the motion to withdraw his pleas for the same reason.

Crim. R. 11 states, in pertinent part:

"(C) Pleas of guilty and no contest in felony cases.

* * *

"(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept such plea without first addressing the defendant personally and:

"(a) Determining that he is making the plea voluntarily, with understanding of the nature of the charge and of the maximum penalty involved, and, if applicable, that he is not eligible for probation."

Initially, this court recognizes that substantial compliance is the requisite standard applicable to Crim. R. 11. *State v. Stewart* (1977), 51 Ohio St. 2d 86; *State v. Strawther* (1978), 56 Ohio St. 2d 298. After the trial court properly determined that appellant fully understood his constitutional rights and the legal consequences of his pleas of no contest, the following dialogue took place between the court and appellant:

"THE COURT: Do you understand the penalties that can be imposed in this case?

"THE DEFENDANT: Yes, sir.

"THE COURT: Okay. *And I'm going to explain them to you for the record just to make sure that you understand what they are.*

Those penalties involve sentences on each case of five, six, seven, eight, nine, ten to twenty-five years and a fine in each case of up to ten thousand dollars, do you understand that?

"THE DEFENDANT: Yes, sir.

"THE COURT: And do you also understand that if I choose to do so I can run — I can impose maximum sentences and run those sentences consecutively, *which in essence would give you penalties of 60 to 150 years. However, the Ohio Revised Code Section 2929.41 says that the maximum sentence that could be served on consecutive multiple sentences is a period of 15 years.* You understand that?

"THE DEFENDANT: Yes, sir.

* * *

"THE COURT: There is no probation.

"THE DEFENDANT: Yes, sir.

"THE COURT: *And it's highly likely, and I think your attorneys have already told you this and I've indicated that to your counsel,* that it's highly likely that maximum terms of imprisonment *would be imposed in this case and you understand that?*

"THE DEFENDANT: Yes, sir.

* * *

"THE COURT: All right. *Do you understand everything that I have said to you here this afternoon?*

"THE DEFENDANT: Yes, sir.

"THE COURT: Do you understand everything that your attorneys and the prosecutor have said here this afternoon?

"THE DEFENDANT: Yes, sir.

> "THE COURT: And is it still your desire then to enter pleas of no contest to six counts of rape, each being an aggravated felony of the first degree?
>
> "THE DEFENDANT: Yes, sir. "(Emphasis added.)

From the above conversation, it is readily apparent Hart knew and understood that the penalties for each charge carried a possible sentence of ten to twenty-five years. Furthermore, Hart indicated to the trial court that he understood it was highly likely he would receive the maximum terms of incarceration. However, it is also evident that Hart did in fact receive conflicting, arguably erroneous information regarding the maximum sentence involved.

The error Hart claims is in the trial court's reference to R.C. 2929.41, where the court informed Hart that the maximum sentence that could be served on consecutive multiple sentences is fifteen years. Furthermore, Hart asserts that he was misinformed by his attorneys and the prosecutor as to the maximum sentence that could be imposed.

The crux of appellant's claim is that he was misinformed by the trial court, the prosecutor and his own counsel as to the maximum sentence which could be imposed upon him. Appellant contends that his understanding of the plea bargain arrangement was that the maximum sentence he would serve in prison was fifteen years. That is to say, his belief was that he would receive a maximum fifteen year sentence, less time off for good behavior. Hart's argument concludes that he was induced to enter the plea bargain agreement based upon incorrect information, and that he should now be permitted to withdraw his pleas of no contest.

The trial court, in denying the motion to withdraw Hart's pleas, found that Hart was aware of the actual sentencing

possibilities, and that even if he were not, he would have entered the pleas regardless of the incorrect information. In reaching this conclusion, the lower court used a test first enunciated in *Kelleher v. Henderson* (C.A.2, 1976), 531 F.2d 78.[2] Therein, the court held that knowledge of the maximum and minimum sentences is not constitutionally required, and the appropriate test is whether the plea would otherwise have been made.

Increasingly, Ohio courts are beginning to recognize this standard. The Supreme Court of Ohio in *State v. Stewart* (1977), 51 Ohio St. 2d 86, referred to the above standard, holding that the trial court's failure to advise a defendant he is ineligible for probation does not constitute prejudicial error; and there is substantial compliance with Crim. R. 11. *Id.* at 93.

Citing *Stewart, supra* (and also noting the Ohio Supreme Court's reference to the above standard) other Ohio Courts of Appeal are beginning to express their amenability to this test. See *State v. Waddell* (1985), 26 Ohio App. 3d 33, 34; *State v. Flint* (1986), 36 Ohio App. 3d 4, 9.

In the case *sub judice,* appellant received conflicting information in regard to the effect of consecutive sentencing on the maximum penalty he could serve. It is irrefutable that he did receive accurate information from the trial court regarding the maximum sentences involved with the charges to which he pled. The trial court informed appellant he could receive a penalty of five, six, seven, eight, nine, or ten to twenty-five years in prison. Additionally, appellant was well aware that he very likely would receive the maximum sentence. In the instant case, this court finds that appellant has not shown he was

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[2] The trail court ruled that a defendant must show he was unaware of the actual sentencing possibilities and that he would not have entered the pleas had he received correct information. The trial court, in support, cited to *Hunter v. Fogg* (C.A.2, 1980), 616 F. 2d 55, and *Caputo v. Henderson* (C.A.2, 1976), 541 F.2d 979. In both of these cases, the court used the test in *Kelleher, supra.*

prejudiced by the trial court's oversight regarding consecutive sentencing. Support for this conclusion can be found in *Flint, supra,* where the court ruled a defendant need not be informed of the possibility of consecutive sentencing, since Crim. R. 11 does not mention consecutive sentencing. *Id at* 10.

In addressing the question as to whether Hart would have entered the pleas had he received the correct information, this court finds sufficient evidence to support the trial court's decision. Hart faced a nineteen count indictment, with multiple life sentence offenses. Both of Hart's attorneys acknowledged the strength of the state's case, which included testimony from the victims and corroborating medical evidence.[3] Indeed, at his hearing on the motion, Hart testified as follows:

> "Q. What was your assessment of the likelihood of being acquitted by a jury if you went to trial on those nineteen counts?
>
> "A. At the beginning I thought I had a chance, but towards the end with all the publicity I felt I didn't have a chance, or too much of a chance being in Toledo.
>
> "Q. You felt you didn't have much of a chance of getting an acquittal?
>
> "A. Not towards the end, no, sir.
>
> "Q. And you held that view on January 14, 1987?
>
> "A. That's right, sir."

---

[3] At the plea bargain hearing, the state went so far as to proffer evidence that Hart and his wife Linda took one of the female victims to a medical facility to determine whether she was pregnant or not, thus exhibiting the strength and detail of the state's case. (Sentencing transcript at 22.)

Lastly, Hart and his attorneys indicated to the trial court, both at sentencing and at the hearing on the motion, that a major concern of Hart's was the amount of publicity and adverse effect on his family had the cases gone to trial. Therefore, this court finds no error in the lower court's determination that Hart would have entered the no contest pleas irrespective of the information he received regarding the maximum sentence.

In his brief, appellant repeatedly calls to this court's attention testimony he gave at the hearing on his motions. The Ohio Supreme Court has held that "*** the good faith, credibility and weight of the movant's assertions in support of the motion are matters to be resolved by [the trial] court." (Citation omitted.) *Smith, supra,* at 264. In reviewing appellant's testimony at the plea bargain hearing and during the hearing on the motion, we find the record replete with conflicting, contradictory statements and reasons for entering the plea agreement. As shown above, the trial court is vested with determining appellant's credibility, and not this court. See also, *Caraballo, supra,* at 67.

In concluding our discussion on appellant's first two assignments of error, we agree with the trial court that Hart was aware of the actual sentencing possibilities and the maximum sentence involved. Additionally, we find Hart would have entered into the plea bargain agreement even if he possessed completely accurate information. For all of the above reasons, we find the trial court substantially complied with Crim. R. 11. Appellant's first two assignments of error are found not well-taken.

In his third and last assignment of error, appellant argues ineffective assistance of counsel. The basis for this claim is once again the wrong information conveyed to him by his attorney concerning the maximum sentence involved.

The general test for a claim of ineffective assistance of counsel was set forth in *Strickland v. Washington* (1984), 466 U.S. 668. Subsequently, in *Hill v. Lockhart* (1985), 106

S.Ct. 366, the Supreme Court applied this test to challenges to guilty pleas based on ineffective assistance of counsel. Applying the test to the case *sub judice,* this court finds appellant's last assignment of error is without merit.

In *Hill, supra,* the United States Supreme Court held that to satisfy the prejudice requirement of the test, "*** the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 370. Already determining that appellant would have entered his pleas of no contest anyway, he has not satisfied the prejudice requirement.

Again, one needs only to keep in mind that appellant faced a nineteen count indictment, of which nine counts carried a mandatory life sentence, to see the advantages of plea bargaining. Additionally, both of the attorneys for appellant indicated to him that the state had a strong case. Indeed, appellant himself stated he stood little chance of exoneration. At the plea hearing, appellant's attorney alluded to spending many hours reviewing the evidence and that appellant was aware of said evidence as well as his constitutional rights. Appellant signed a written plea of no contest in both cases. Furthermore, when asked by his own attorney whether they reviewed and understood the documents, appellant replied in the affirmative.

Lastly, this court notes the wisdom of the United States Supreme Court in *Strickland, supra,* where the court stated:

> "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act

> or omission of counsel was unreasonable. Cf. *Engle v. Isaac,* 456 U.S. 107, 133-134 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " (Citations omitted.) *Id.* at 689.

For the above reasons, appellant's third assignment of error is found not well-taken.

In conclusion, this court again would point out that the appropriate standard of review pursuant to a motion made under Crim. R. 32.1 is one of "manifest injustice." *Smith, supra,* at 264. Additionally, "*** it is clear that under such standard, a postsentence withdrawal motion is allowable only in extraordinary cases." (Citation omitted.) *Id.*

The practical considerations and policy reasons for this standard are evident in the case *sub judice.* The standard seeks to prevent a defendant from testing the weight of potential punishment by pleading guilty or no contest, then subsequently withdrawing his plea in the hopes of obtaining a lighter sentence after receiving an unexpectedly harsh penalty. *Kadwell v. United States* (C.A. 9, 1963), 315 F.2d 667; *Barker v. United States* (C.A. 10, 1978), 579 F.2d 1219.

In light of the above policy considerations in regard to the proper administration of justice and the facts and circumstances of the case *sub judice,* this court determines appellant has simply not demonstrated

manifest injustice. Further, he has not shown an abuse of discretion on the part of the trial court.

On consideration whereof, this court finds that the defendant was not prejudiced or prevented from having a fair proceeding, and judgment of the Lucas County Court of Common Pleas is hereby affirmed. It is ordered that appellant pay the court costs of this appeal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp. R.4, amended 1/1/80.

Alice Robie Resnick, P. J. _____
PRESIDING JUDGE

John J. Connors, Jr., J. _____
JUDGE

Peter M. Handwork, Jr. _____
CONCUR. JUDGE

IN THE COURT OF COMMON PLEAS
OF LUCAS COUNTY, OHIO

STATE OF OHIO,	:	FILED LUCAS COUNTY OCT 7, 2:55 p.m. '87
Plaintiff,	:	
v.	:	CASE NO. CR85-6605 CR85-6919
DARYL LEE HART,	:	
		Opinion and Order
Defendant.	:	

Defendant, Daryl Lee Hart, has filed a motion to vacate his pleas of no contest in CR85-6605 and CR85-6919. The court has held a hearing on defendant's motion in which defendant was present with counsel and testimony was adduced. The defendant and state have submitted briefs.

The court has heard the testimony and reviewed the briefs.

In order for the defendant to vacate his pleas, he must show that he was unaware of the actual sentencing and that he would not have entered the pleas had he possessed accurate information.

Hunter v. Fogg, 616 F.2d 55, 58 (2d Cir., 1980); *Caputo v. Henderson,* 541 F.2d 979, 984 (2d Cir. 1976).

The court finds that the defendant was made aware of the actual sentencing possibilities.

Even if he was not aware of the actual sentencing possibilities, the defendant testified to other reasons for entering the pleas which indicated that the defendant would have entered the pleas anyway.

Therefore, the defendant's motion is found not well-taken and is ordered denied.

Date: _____ _____

Richard W. Knepper

(2)

No. 90-1849

Supreme Court, U.S.
FILED
JUN 26 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

NORRIS McMACKIN, WARDEN,

Petitioner,

v.

DARYL L. HART,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, as represented by Petitioner, the Federal Circuit Court did disregard express factual findings arising out of a full state court evidentiary hearing which may have been supported by the record.

PARTIES

A complete list of all parties is included in the Petition for Writ of Certiorari.

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Sumner v. Mata, 449 U.S. 539 (1981) opinion after remand 455 U.S. 591 (1982) 3

STATUTES:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254(d)(8) 3, 4

JURISDICTION

Respondent agrees that jurisdiction would be conferred pursuant to 28 U.S.C. §1254(1). However, for the reasons set forth below, Respondent respectfully requests this Honorable Court to decline issuance of a writ of certiorari in this matter.

STATEMENT OF THE CASE

Respondent accepts the statement of the case related to the Petition only regarding the history of this case.

At the time respondent originally entered his pleas of no contest, the most critical portion of the negotiated agreement was that respondent would receive a maximum term of fifteen (15) years incarceration and the harm specifications as to various counts of rape would be dismissed. (Evidentiary Tr. 8, 21, 40-41, 46-47, 127-128).

Prior to entering pleas of no contest the respondent had numerous conversations with both of his attorneys. Negotiations centered around the actual length of time the respondent would be incarcerated and away from his family.

There were several conversations between the trial court judge, respondent's attorneys and the prosecuting attorney. These conversations were recorded by one of respondent's attorneys and repeated to the respondent. (Evidentiary Tr. 46-47, 78-80, 88).

Respondent's attorney, Raymond Runner, specifically informed respondent that he would serve a maximum term of incarceration of fifteen (15) years. (Evidentiary Tr.

144, 149, 153, 158-159, 162, 166). Co-counsel for the respondent also informed him that the maximum sentence of incarceration would be fifteen years. (Evidentiary Tr. 20, 42-44, 53, 77, 80, 84, 96-97).

Respondent did not enter pleas of no contest until he was repeatedly assured by his counsel, and later the trial court judge, that he would be incarcerated for a maximum period of fifteen (15) years. (Evidentiary Tr. 20, 128, 154). The respondents concern regarding trial publicity was far outweighed by the most fundamental and crucial fact to be considered, the length of incarceration. The record is clear that respondent's ultimate motivating factor in entering his pleas was the period of time he would be separated from his family. (Evidentiary Tr. 54-55).

On May 29, 1991, the respondent was re-sentenced to a term of eight (8) to fifteen (15) years in the Lucas County Court of Common Pleas. This sentence conformed with the instructions of the United States Sixth Circuit Court of Appeals and their decision rendered March 5, 1991. Petitioner, with complete knowledge of what occurred in the Lucas County Court of Common Pleas, thereafter, on the same day, posted their petition.

Respondent's sentence on May 29, 1990, in original case numbers CR85-6605 and CR85-6916, was predicated upon a finding of guilty of attempted rape, and not rape, as was the finding in the original case. Thereafter, respondent was ordered to serve multiple concurrent sentences of eight (8) to twenty-five (25) years incarceration. Once the new findings occurred, and the sentence imposed, the issue raised in petitioner's Petition became moot.

SUMMARY OF ARGUMENT

Federal courts are required to give deference to factual determinations made by state courts so long as the state court record adequately supports said determinations. However, the federal courts are not required to agree with state court decisions which are wholly unsupported by the record. The decision rendered by the Sixth Circuit Court of Appeals correctly considered the record of the state courts and determined that no one understood the actual sentence to be imposed upon respondent, thus respondent's plea could not be of a voluntary nature.

ARGUMENT

The Sixth Circuit Court of Appeals gave deference to the state court record as is required by *Sumner v. Mata*, 449 U.S. 539 (1981); *Hart v. Marion, et al.*, 927 F. 2d 256 (6th Cir. 1991). Thereafter, the Court of Appeals correctly considered the record as a whole, giving deference to the state court's decision, pursuant to 28 U.S.C. §2254(d)(8).

Respondent's counsel, the prosecuting attorney, and the trial judge repeatedly informed the respondent that he would serve a maximum term of incarceration and then be released. A review of the record, by the Sixth Circuit Court of Appeals, clearly demonstrated that no one apparently understood the statutory sentencing provisions. Thus, the respondent could not be expected to understand the sentencing provisions and voluntarily enter pleas of no contest.

The record could not be any more concise regarding the misunderstanding which occurred where the trial judge twice informed the respondent, incorrectly, as to the maximum sentence to be imposed. (Evidentiary Tr. 99-101). The Appellate Court correctly determined, based upon a review of the whole record, that, in essence, the respondent could not have understood the impact of the maximum sentence being imposed if the trial court did not understand the maximum sentence to be imposed.

Petitioner cites *Nichols v. Perini*, 818 F. 2d 554 (6th Cir. 1987) for the apparent proposition that the Sixth Circuit, in the present case, issued a contrary decision based upon an identical set of circumstances. Such a proposition is incorrect and a distortion of the facts presented in *Nichols*, supra. In *Nichols*, supra, the petitioner never raised any issue contained in 28 U.S.C. §2254(d). Thus, the Sixth Circuit correctly deferred to the state court record.

The petitioner is, in reality, arguing that state court decisions, subsequent to the creation of a record, must be upheld by the federal courts regardless of the absurdity of the state court decision. This argument must fail in view of the federal court's right to review the whole record pursuant to 28 U.S.C. §2254(d). The record, in the present instance, is resplendent with evidence that not one of the parties involved understood the maximum sentencing provisions which were being imposed.

Petitioner is additionally now attempting to raise an issue which is moot. Petitioner knew the parties agreed to a re-sentencing pursuant to the decision of the Sixth Circuit. Petitioner then mailed this Petition once the re-

sentencing occurred on May 29, 1991. For this reason alone, the Petition should be dismissed.

CONCLUSION

Respondent respectfully requests this Court to decline issuance of a writ of certiorari in this case.

Respectfully submitted,

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